BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RENAE L. SMITH Claimant	)	
VS.	)	
COFFEYVILLE COMMUNITY JR. COLLEGE Respondent	)	Docket No. 1,013,917
AND	)	
KANSAS ASSOCIATION OF SCHOOL BOARDS WORKERS COMPENSATION FUND, INC. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 31, 2007, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on April 2, 2008. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant's average gross weekly wage was $304 without fringe benefits and $315 with fringe benefits included. The ALJ further found Dr. Pedro Murati and Dr. Paul Stein to be equally credible and found that claimant had a 7 1/2 percent functional[1] disability to the body as a whole, which was a split of the ratings of Drs. Murati and Stein. The ALJ found that claimant had not made a good faith job search, that she should be able to work at a wage of $291.97 and that she had

[1] The ALJ's Award states the award is for a "work disability," but this is clearly a misstatement as the 7.5 percent permanent partial disability award was based upon claimant's functional impairment rating not the percentage of wage and task loss.

no work disability. Accordingly, he awarded permanent partial disability benefits based solely on the percentage of functional impairment.

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument, the parties agreed that the stipulations listed in the ALJ's Award were correct and that the last day claimant worked for respondent was sometime in September 2003.[2]

ISSUES

Claimant requests review of the ALJ's findings concerning average weekly wage (AWW) and the nature and extent of claimant's impairment. Claimant argues the ALJ erred in computing claimant's AWW and contends that claimant testified her wage is $317.25. Also, the ALJ erred in finding claimant's functional impairment to be 7.5 percent because Dr. Murati's testimony is more certain and credible than that of Dr. Stein. Accordingly, claimant requests the Board find that she has a 15 percent permanent partial impairment to the body as a whole consistent with Dr. Murati's rating opinion. Claimant further argues that the applicability of the good faith test is in question, relying on the Kansas Supreme Court decisions in *Casco*[3] and *Graham*[4]. In the alternative, claimant asserts she made a good faith effort to retain or find employment. Accordingly, she requests the Board find she is entitled to a work disability of 77.25 percent based upon a 100 percent wage loss and a 54.5 percent task loss.

Respondent contends the wage statement[5] shows claimant's AWW is $303.95. Respondent also argues that there is no credible medical opinion that claimant has a functional impairment as a result of her work injury. Further, claimant is not entitled to a work disability award because she failed to prove that she has any impairment as a result of her injury and because she failed to prove any task loss or wage loss. Furthermore, claimant failed to make a good faith effort to retain or obtain employment and she retains the ability to earn a comparable wage. Accordingly, respondent requests the Board find that claimant sustained neither a permanent impairment of function nor a work disability as a result of her injury.

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[2] The parties could not agree on a specific day in September. Therefore, for purposes of computation of the award, the Board will use September 15, 2003, as claimant's last day worked for respondent.

[3] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 944, *reh. denied* (2007).

[4] *Graham v. Dokter Trucking Group*, 384 Kan. 547, 161 P.3d 695 (2007).

[5] R.H. Trans., Resp. Ex 1.

The issues for the Board's review are:

(1) What is claimant's AWW?

(2) Did claimant prove that she suffered a functional impairment as a result of her work-related accident at respondent? If so, what was the nature and extent of that impairment?

(3) Did claimant prove she had a task loss and/or wage loss as a result of her work-related accident?

(4) Is the good faith test still applicable? If so, did claimant make a good faith effort to retain or obtain post-injury employment?

FINDINGS OF FACT

Claimant worked for respondent in maintenance for about two years. She testified she worked 40 hours a week and was paid $7.75 per hour. She worked an average of two hours overtime a week, for which she was paid time and a half. She also testified that respondent paid part of her health insurance and contributed toward a 401(k). However, respondent's Exhibit 1 to the regular hearing shows claimant's base hourly rate was $7.25. It further shows that although claimant often worked in excess of 40 hours per week, she was not paid overtime unless she worked over 45 hours. There is no evidence concerning the value of the additional compensation items paid by respondent, such as the amount respondent paid towards claimant's health insurance or retirement fund.

On May 27, 2003, claimant was stripping wax off the basement floor using a buffer when the buffer went out of control and twisted her over to the side. She felt pain in her low back up to her thoracic spine and had numbness down her left arm and left leg. She believes the buffer weighs about 200 pounds. It buffs the floor by vibrating up and down and side to side. Claimant is 5‘ 3" tall and weighs about 105 pounds. She needed all her strength to guide the buffer.

Claimant immediately reported the accident to her supervisor. She was seen on June 3, 2003, by Dr. Ervin Howell, an orthopedic surgeon. Dr. Howell took her off work for a week, sent her to physical therapy, and gave her work restrictions. Claimant went back to work after her initial therapy. She continued to have problems and returned to Dr. Howell, who sent her to more physical therapy. Claimant was also given a back brace and was referred to Dr. Kevin Komes, a physiatrist.

Although claimant did not testify concerning the dates she was off work after her injury, other than the one week Dr. Howell took her off after June 3, 2003, the report of

Steve Benjamin indicates she told him she was also off work from July 25, 2003, until sometime in September 2003.

At the regular hearing, claimant testified she was terminated by respondent in September 2003.[6] She was told she had been seen outside of one of her buildings with something in her hand. This was all she was told about why she was terminated. Claimant was in charge of two buildings. The buildings were two blocks away from each other, and she had to go back and forth between the buildings. There was no requirement that kept her inside the buildings. Claimant believes that at the time she was seen, she was taking a roll of blue paper towels to the alumni center in order to clean mirrors.

Claimant saw Dr. Komes on October 16, 2003. He had her undergo a CT scan. She was also given an epidural steroid injection. The injection did not help. Claimant was also referred to Dr. Paul Stein, a neurosurgeon. He did not treat her but had her undergo an MRI of her cervical spine and a CT of her thoracic spine. Claimant was then referred back to Dr. Howell, who sent her to more physical therapy and prescribed medication.

At the regular hearing, claimant described having pain all the time in her back. If she starts doing anything that takes any amount of time, she starts going numb on the left side of her body, including her arm, hip, leg and toes. The pain in her low back shoots through the left side and slowly spreads through the whole back.

Claimant testified that she looks for work every day. She looks in the newspaper and goes to the unemployment office. When she hears of jobs from other people, she goes to check on them. She found a job at Amazon in Coffeyville, but she only lasted six hours at that job. She began having pain and her left side started going numb, so she left. Those symptoms then returned to the level they were before she went to work at Amazon. Her job at Amazon consisted of pushing a big cart and picking up empty boxes. She has not been able to find any other job.

Dr. Paul Stein, a board certified neurological surgeon, saw claimant on April 28, 2004, at the request of respondent. She told him she had surgery for thoracic scoliosis around 1993 with no residual discomfort or low back pain related to her scoliosis, and that she had no numbness, tingling or paralysis related to the scoliosis. Also claimant reported she had an injury in 2002 working for the same employer where she was knocked down by a buffer while stripping a floor. She took some anti-inflammatory medicine for a short time but had no specific residual difficulty.

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[6] In the history claimant gave Dr. Stein on April 28, 2004, she told him she had been off work about six months and was still working for respondent. In Steve Benjamin's report, he notes that she claimed she was terminated sometime in April 2004 but could not remember the exact date. Nevertheless, during oral argument to the Board, the parties stipulated that claimant was terminated by respondent in September 2003.

Dr. Stein noted that contrary to claimant's statement that she had no residual pain from the previous back conditions, Dr. Howell's medical records of June 3, 2003, indicated that x-rays of claimant's back had been taken six months before because of increased back pain. This would correspond with the 2002 injury claimant described.

Claimant told Dr. Stein she has pain between the shoulder blades extending down the back to the hips. She said if pressure was put on the top of her head, she could feel it in her lower back. She indicated that her upper and lower back pain were about equal and any kind of motion would aggravate the discomfort. She took Hydrocodone every five hours during the day and Valium to sleep at night. She also reported numbness and tingling in the left arm and leg, predominately in the leg with some improvement in the arm since the accident at work.

Claimant told him that on May 27, 2003, she was stripping wax and buffing a floor. She went outside to call her boss to look at the work she had done and developed an acute pain between her shoulder blades all the way down to her hip. She had numbness in her left leg and had to ease herself down to the pavement. At the time, she could not move her left arm or leg as both were completely paralyzed. With that history, Dr. Stein said claimant would have to have had a lesion as high as the cervical spine, at least above the level of her previous scoliosis surgery.

Dr. Stein testified that when claimant walked, she had a slight dragging of her left leg. She could not or would not walk on her toes or the heels of her feet. She manifested an apparent inability to raise her body weight on to her left calf or rise from a chair on her left leg, whereas she could do all those things on the right side. If this was factual, it would represent a considerable amount of weakness in the left lower extremity over multiple nerve innervations and different muscles. However, Dr. Stein found no atrophy in any of the muscles of her lower extremities. Claimant showed a decrease of pinprick in the left lower extremity and a subjective decrease in vibratory sensation. Reflexes were normal. Passive rotation of the trunk and axial compression, two Waddell tests for nonorganic back pain, were positive. Dr. Stein also indicated that claimant had tenderness to light touch in the lumbar spine. This was another positive Waddell sign because there is no reason for a light touch on the skin to cause a response because there is no transmission of pressure to the deeper structures.

Claimant reported pain all the way up and down her spine with attempts to move her neck. When Dr. Stein tested strength in her upper extremities, he could find no definite weakness when asking her to pull or push with a particular muscle group. When he attempted to test her grip strength using a dynamometer, he got considerable decrease in the left grip compared to the right, but it did not follow a normal curve. He was concerned as to whether he was getting full effort from claimant.

Claimant showed a decrease of vibratory sensation throughout the left upper extremity, the left collar bones, and left side of the sternum compared to the right. That is

called splitting the sternum and is a classic test neurologists use to see if a sensory deficit in an extremity is actually physiologic. It is not anatomically or physiologically possible for a person to have loss of vibratory feeling on one side of the sternum compared to the other. The claimant split her sternum, saying her vibratory sensation on the right was 100 percent and the left was only 25 percent, which is not possible, according to Dr. Stein. This indicated to Dr. Stein that at least that part of the examination was not anatomic or physiologic; some secondary factor was involved, whether conscious or unconscious. Also, Dr. Stein was not able to produce radicular findings by extending and rotating claimant's neck.

Dr. Stein stated that claimant's presentation was unusual. He stated that unless something catastrophic is going on, it is unusual for someone to suddenly become paralyzed on the left side. Those things are usually related to a stroke, which did not seem to be the case here, or a vascular malformation in the brain or spinal cord.

Despite Dr. Stein's examination suggesting a strong element of conscious or subconscious symptom magnification and manipulation, Dr. Stein recommended diagnostic testing to be sure there was no real underlying pathology. He ordered an MRI scan. The MRI showed some minor findings but nothing consistent with her symptomatology. A CT scan was also performed, which showed no evidence of bony stenosis of the spinal canal.

After his examination of claimant and review of the results of the MRI and CT scans, Dr. Stein was unable to provide claimant with a diagnosis. Dr. Stein said that claimant may have had a neck or back strain while performing the work activity and may have had some discomfort. However, the examination was invalid, and there were no findings to confirm anything other than perhaps a simple strain. He was asked by respondent for a functional impairment rating. Since he did not have a diagnosis and had no real objective findings, he did not have any way to provide a rating or work restrictions. He said the AMA *Guides*[7] require use of the diagnosis related estimate (DRE) method in rating spine impairment, and if there is no diagnosis, you cannot use the DRE method. Dr. Stein found nothing that would explain all, or even most, of her symptoms.

Dr. Stein was unable to offer any permanent restrictions. He had no medically documented basis to restrict claimant from doing anything, including the tasks listed on the task list prepared by Steve Benjamin.

Dr. Pedro Murati, who is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations, examined claimant on September 12, 2006, at the request of claimant's attorney. This examination was approximately two

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

and a half years after her examination by Dr. Stein and over three years after her accident. At the time of Dr. Murati's examination, claimant's chief complaints were upper back pain that radiated into both shoulders and low back pain that radiated into the left leg. He obtained a history from claimant and reviewed her medical records.

Upon examination, Dr. Murati found trigger points in both claimant's shoulder girdles extending into the thoracic paraspinals, which is why she has myofascial pain syndrome. He believes she has a chronic sprain. He also diagnosed her with low back pain with radiculopathy. She was missing the muscle stretch reflex of the right hamstring and had a depressed right ankle reflex, which are evidence of radiculopathy. Also, her sensational findings have decreased along the left L5 and S1 dermatomes and she had positive straight leg raises, which are also consistent with radiculopathy.

Dr. Murati also diagnosed claimant with left sacroiliac joint dysfunction. However, under the AMA *Guides* he could only rate one condition of the spine. He rated claimant's radiculopathy condition, which was the more significant condition of the two. He opined that claimant's injuries were a direct result her work-related injury on May 27, 2003.

Based on the AMA *Guides*, Dr. Murati rated claimant as having a thoracolumbar DRE Category II impairment of 5 percent for myofascial pain syndrome. He rated claimant as having a 10 percent permanent partial impairment for radiculopathy. This combines for a 15 percent whole person impairment. This rating is distinct from any preexisting problems, and the entire 15 percent rating is attributable to the work injury at respondent. When Dr. Murati examined claimant, he did not believe she had a cervical injury or neck problem.

Dr. Murati placed restrictions on claimant of no crawling, no heavy grasping with either hand, and no above shoulder level work with both arms. She should do no lifting, carrying, pushing, or pulling greater than 10 pounds, 10 pounds occasionally, and 5 pounds frequently. She should only rarely bend, crouch and stoop, occasionally sit, climb stairs or ladders, squat, and drive. She should work no more than 18 inches away from the body and should alternate sitting, standing and walking.

Karen Terrill, a rehabilitation consultant, interviewed claimant by telephone on November 1, 2006, at the request of claimant's attorney. Together with claimant, she compiled a list of 22 tasks claimant had performed in the 15-year period before her accident at respondent on May 23, 2003.

Dr. Murati reviewed the task list prepared by Karen Terrill. Of the 22 nonduplicative tasks on that list, Dr. Murati believes claimant was unable to perform 12 for a 54.5 percent task loss.

Ms. Terrill encourages job seekers to make five to ten applications a week unless the community does not support it and said a person who has made only 12 applications

in 42 months probably has not made a good effort. Ms. Terrill opined that jobs claimant can perform will be limited, especially with a 10-pound lifting restriction and her additional restrictions. Claimant has an added disadvantage of not having a GED. Ms. Terrill did not give an opinion as to what claimant could reasonably be expected to earn post-injury in the Montgomery County, Kansas, labor market.

Steve Benjamin, a rehabilitation consultant, interviewed claimant by telephone on May 24, 2007, at the request of respondent. Together they prepared a list setting out 34 nonduplicative tasks she performed in the 15-year period before July 24, 2003.

Mr. Benjamin said that a person looking for a job should make five to ten applications per week, depending upon the geographic area a person lives. A person should make at least five applications per week in order to constitute a good faith effort. Claimant told him she had applied to between 20 and 25 places since April 2004. That would average less than one application per month in three years and, in his opinion, was not a good faith effort. Claimant had not registered at the Work Force Development Center to look at their job listings. However, she told Mr. Benjamin that she went to the Center once a week to check job listings.

Mr. Benjamin believed that because Dr. Stein did not give claimant any restrictions, she should be able to return to her preinjury job and not incur a wage loss. He believed claimant, without violating the restrictions of Drs. Stein or Murati, could work as a cafeteria cashier, a counter/rental clerk or a hotel clerk and could earn between $253.60 and $339.20, or an average of $291.87 per week. He did not do a labor market survey.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." This must be established by a preponderance of the credible evidence.[8]

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

[8] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 2007 Supp. 44-511(a) states in part:

(2) The term "additional compensation" shall include and mean only the following: . . . (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

. . . .

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

(b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:

. . . .

(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the

accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

In *Casco*,[9] the Kansas Supreme Court stated:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.

In *Graham*,[10] the Kansas Supreme Court stated:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as

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[9] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6.

[10] *Graham v. Dokter Trucking Group*, 284 Kan. 547, Syl. ¶ 3.

> long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Although not mentioned in K.S.A. 44-510e or elsewhere in the Workers Compensation Act, our Kansas appellate courts have held that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[11] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[12] In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment.[13]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[14] An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.[15]

Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[16] In providing accommodated employment to a worker, *Foulk*[17] is not applicable where the accommodated job is not genuine[18] or not within the worker's medical restrictions,[19] or where the worker is fired after attempting to work within the medical restrictions and

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[11] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, Syl. ¶ 5, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

[13] *Parsons v. Seaboard Farms, Inc.,* 27 Kan. App. 2d 843, Syl. ¶ 1, 9 P.3d 591 (2000).

[14] *Id.* at Syl. ¶ 3.

[15] *Oliver v. Boeing Co.*, 26 Kan. App. 2d at 77.

[16] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[18] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[19] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

experiences increased symptoms.[20] Even returning to one's regular job will not preclude a work disability where the job is only temporary and not offered in good faith.[21]

ANALYSIS

The wage statement introduced by respondent at the regular hearing shows that claimant was paid $7.25 per hour. It also shows that claimant was not paid overtime until after she had worked 45 hours in a single week. As such, she was a full-time hourly employee with a regular and customary workweek of 45 hours. Therefore, her base weekly wage was $326.25 ($7.25 x 45 hrs.). The wage statement also shows that claimant worked a total of 22.43 hours of overtime during those 26 weeks, for which she was paid time and a half. Therefore, she averaged .86 hours of overtime per week or $9.36 per week in overtime ($10.88 x .86 hr.). Her gross AWW, therefore, is $335.61 ($326.25 + $9.36).[22]

The ALJ found claimant had a 7.5 percent impairment of function to the body as a whole. The Board agrees and affirms this finding. The ALJ further found that claimant was not entitled to a work disability because she did not make a good faith job search and imputed a wage of $291.97. The Board agrees claimant failed to make a good faith job search and that a wage of $291.97 should be imputed, but disagrees this precludes an award of work disability.

Claimant temporarily returned to work for respondent after her injury and during this time presumably earned 90 percent or more of her preinjury average gross weekly wage. Since her termination from respondent, claimant has only worked less than one full day. Claimant has otherwise been unemployed and, thus, has had a 100 percent actual wage loss since September 2003, when she was terminated by respondent. No physician has said claimant cannot work, and claimant is not alleging that she is permanently totally disabled. Respondent has not argued that the circumstances surrounding its termination of claimant somehow preclude claimant from receiving a work disability.

However, that does not conclude the Board's analysis for a determination of claimant's wage loss. Despite the clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed

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[20] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[21] *Edwards v. Klein Tools Inc.*, 25 Kan. App.2d 879, 974 P.2d 609 (1999), and *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[22] The total amount of overtime pay reflected on the wage statement is $241.52 rather than $244.04 (22.43 x $10.88) because claimant was underpaid for .97 hour of overtime in week No. 17, when she was paid overtime at only straight time rather than time and a half. The other overtime entries are at time and a half.

whenever possible, there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland* and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to find appropriate employment.

Claimant's job search has been focused primarily on checking the help wanted ads in the classified section of her local newspaper and making periodic visits to the state job service office. This could constitute good faith were it coupled with a reasonable number of actual applications. Unfortunately, the evidence of making a reasonable effort in applications is lacking. Claimant falls considerably short of the number of job applications the two vocational experts describe as a minimum. And claimant's geographic area is not so rural or sparsely populated as to justify her limited number of contacts. The Board finds claimant has failed to demonstrate a good faith job search. Acordingly, the Board must impute a wage to her based upon her ability to earn wages post injury.

Ms. Terrill identified several factors that would limit claimant's job market and diminish her wage-earning ability. These include the restrictions recommended by Dr. Murati and claimant's limited education, training and transferrable job skills. Ms. Terrill did not say what kinds of jobs claimant could perform or what she could expect to earn.

In the absence of restrictions, Mr. Benjamin believed claimant should be able to return to her preinjury job with respondent, if that job were available, which it is not. He also said she could work as a cafeteria cashier, counter/rental clerk, or a hotel clerk. Although he said his opinion was based upon the "combined" restrictions of Dr. Stein and Dr. Murati[23], it appears Mr. Benjamin was considering Dr. Murati's restrictions for these jobs because Dr. Stein did not recommend any restrictions. Mr. Benjamin did not conduct a labor market survey and so he could not say what jobs were available in the Coffeyville or Montgomery County, Kansas, area and what any particular job would pay. Nevertheless, he opined that claimant could earn approximately $291.87 per week based upon his experience and the wage figures from the Kansas Wage Survey. The Board adopts this figure as the best evidence of claimant's post-injury wage earning ability and will impute this AWW to her as her post-injury earnings. Comparing this $291.87 post injury wage to claimant's pre-injury average gross weekly wage of $335.61 results in a wage loss of 13 percent. As this post-injury wage is less than 90 percent of her pre-injury AWW, claimant is not limited to a permanent partial disability award based upon her percentage of functional impairment. Instead, she is entitled to a work disability, which is an average of her wage loss and her task loss.

Dr. Stein did not give claimant any work restrictions and, therefore, he found no task loss. Dr. Murati opined that claimant had lost the ability to perform 54.5 percent of her

[23] Benjamin Depo. at 16.

former work tasks. The Board believes claimant's true task loss lies somewhere between 0 and 54.5 percent and finds it to be 27 percent. Averaging this 27 percent task loss with her 13 percent wage loss results in a work disability of 20 percent. This work disability will begin on September 15, 2003, when she was terminated by respondent and, therefore, no longer earning 90 percent of her pre-injury AWW. Before that date, claimant's permanent partial disability award will be based upon her percentage of functional impairment.

CONCLUSION

Claimant's AWW is $335.61. Commencing May 27, 2003, claimant's permanent partial disability is 7.5 percent based upon her percentage of functional impairment. Thereafter, following her last day of work for respondent on September 15, 2003, she is entitled to permanent partial disability compensation based upon a 20 percent work disability.

The Board notes that the ALJ found the "attorney fee retainer is reasonable and approves such fee agreement."[24] However, the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated December 31, 2007, is modified to find:

Benefits are awarded to claimant for an accidental injury which occurred on May 27, 2003, and are based on an AWW of $335.61, for compensation at the rate of $223.75 per week. Claimant's permanent partial disability to her last day working for respondent, September 15, 2003, is 7.5 percent based upon her percentage of functional impairment. Thereafter she is entitled to permanent partial disability compensation based upon a 20 percent work disability.

Claimant is entitled to 21.86 weeks of temporary total disability compensation at the rate of $223.75 per week or $4,891.18 followed by 15.71 weeks of permanent partial disability compensation at the rate of $223.75 per week or $3,515.11 for a 7.5 percent functional disability followed by 65.92 weeks of permanent partial disability compensation

[24] ALJ Award (Dec. 31, 2007) at 4.

at the rate of $223.75 per week or $14,749.60 for a 20 percent work disability, making a total award of $23,155.89.

As of April 8, 2008 there would be due and owing to the claimant 21.86 weeks of temporary total disability compensation at the rate of $223.75 per week in the sum of $4,891.18 plus 81.63 weeks of permanent partial disability compensation at the rate of $223.75 per week in the sum of $18,264.71, for a total due and owing of $23,155.89, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April, 2008.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge